Workplace Safety and Insurance Appeals Tribunal

505 University Avenue 7th Floor
Toronto ON M5G 2P2
Tel: (416) 314-8800
Fax: (416) 326-5164
TTY: (416) 212-7035
Toll-free within Ontario:
1-888-618-8846

Web Site: www.wsiat.on.ca

Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

505, avenue University, 7e étage
Toronto ON M5G 2P2
Tél. : (416) 314-8800
Téléc. : (416) 326-5164
ATS : (416) 212-7035
Numéro sans frais dans les limites de l'Ontario : 1-888-618-8846

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Ontario

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Quarterly Production and Activity Report

January 1 to March 31, 2009

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Production Summary

- The active inventory totalled 3,936. This is a reduction from the fourth quarter 2008 active inventory of 4,009.

- The Tribunal's "steady state" target is an active inventory of 4,000 appeals. The Q1 active inventory of 3,936 appeals is a significant reduction from a high of 5,492 active appeals at the end of the third quarter of 2006. With this progress in appeal inventory reduction parties are beginning to see decreases in the time to schedule hearings. Additional improvements are anticipated in 2009 and 2010. The Tribunal's target is to offer a hearing date within four months of an appeal being confirmed as hearing ready.

- Incoming appeals numbered 1022, of these 862 were appeals from WSIB decisions and 160 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 824 new appeals and 146 reactivated appeals recorded in the fourth quarter of 2008.
  - In the 1st quarter of 2008 the Tribunal recorded 779 new appeals and 151 re-activations.
  - In 2008, the weekly average of hearing ready appellants was 55. For Q1 2009, the weekly average of hearing ready appellants is 55. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 1,056; this includes 347 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 709 after hearing dispositions; of the after hearing dispositions, 690 followed from Tribunal decisions.

- In Q1-09, the inactive inventory was 3,694 cases (at the end of Q4-08, the inactive inventory was 3,816 cases).

- In Q1-09, 85% of final decisions were released within 120 days. In 2008, 84% of final decisions were released within 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the first quarter of 2009, the notice inventory

included 1,251 dormant cases, the active inventory totaled 3,936 cases, and the inactive inventory totaled 3,694 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q3-2006	5492
Q4-2006	5226
Q1-2007	5170
Q2-2007	5044
Q3-2007	4955
Q4-2007	4650
Q1-2008	4532
Q2-2008	4227
Q3-2008	4048
Q4-2008	4009
Q1-2009	3936

B. Incoming Appeals

Period	Incoming Appeals
Q3-2006	1087
Q4-2006	1007
Q1-2007	1026
Q2-2007	950
Q3-2007	939
Q4-2007	978
Q1-2008	930
Q2-2008	920
Q3-2008	833
Q4-2008	970
Q1-2009	1022

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q3-2006	1083	426	657
Q4-2006	1161	362	799
Q1-2007	1149	383	766
Q2-2007	1132	366	766
Q3-2007	1031	370	661
Q4-2007	1219	427	792
Q1-2008	1173	386	787
Q2-2008	1213	375	838
Q3-2008	1025	299	726
Q4-2008	1029	268	761
Q1-2009	1056	347	709

D. Inactive Inventory

Period	Inactive Inventory
Q3-2006	4303
Q4-2006	4235
Q1-2007	4119
Q2-2007	4109
Q3-2007	4073
Q4-2007	4067
Q1-2008	4067
Q2-2008	4085
Q3-2008	4059
Q4-2008	3816
Q1-2009	3694

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q3-2006	1308	-73
Q4-2006	1420	112
Q1-2007	1353	-67
Q2-2007	1297	-56
Q3-2007	1294	-3
Q4-2007	1358	62
Q1-2008	1233	-125
Q2-2008	1245	12
Q3-2008	1232	-13
Q4-2008	1212	-20
Q1-2009	1251	39

Community Activities

Tribunal staff Garth Dee and Wendy Reynolds organized and hosted a very successful public training session on February 18, 2009. The topics were effective Research and Hearing Preparation; following which, Vice-Chairs Sophie Martel and John Moore answered questions. If you would like to watch the web cast, please e-mail outreach.registration@wst.gov.on.ca to receive the link to this presentation.

Winter 2009 saw the publication of an issue of the Tribunal's newsletter, In Focus, which is available at the Tribunal's web site, www.wsiat.on.ca.

In January 2009, Tribunal staff continued their support of SOAR (the Society of Ontario Adjudicators and Regulators) by contributing to a half day training session on the topic of paralegal regulation. Angelina Petherbridge and David Beattie participated on the organizing committee; Director of Appeal Services, Debra Dileo was a presenter. Ms. Petherbridge and Maria Erskine are members of SOAR's administrative staff committee.

Judicial Review Activity

First Quarter 2009

The first quarter of 2009 was busy and successful in regards to judicial review activity at the Tribunal. The status of applications for judicial review involving the Tribunal for the first quarter of 2009 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. **Decision No.855/03 (November 15, 2005)**

   The worker was a member of a union. Pursuant to the collective agreement, the employer made contributions on the worker's behalf to a benefit plan that provided health and dental care coverage, as well as pension plan coverage. The employer's contributions were based on the hours worked by the worker. Under the terms of the plan, part of the contributions were used to continue the worker's benefits and pension contributions for up to a year after an injury.

   The worker was injured. He alleged that the employer's contribution to his benefits should be included in the calculation of his earnings for the purposes of workplace safety and insurance benefits. The worker's appeal was denied. The Vice-Chair held that Board policy did not include benefit payments and pension plans in earnings basis. There was no direct relationship between the employer's contributions and the benefits the worker received. The Vice-Chair

also held that the Legislature did not intend to include contributions from all employers in Ontario in the earnings of workers, or that some workers would receive non-taxable income.

The worker commenced an application for judicial review. The Board successfully brought a motion to intervene in the judicial review. The judicial review was heard by the Divisional Court on June 27, 2007.

The Divisional Court Panel of Jennings, Swinton and Lederman released its decision on September 10, 2007. The majority of the Panel, consisting of Justices Jennings and Lederman, held the Tribunal's decision was patently unreasonable because it failed to consider the evidence of legislative history contained in submissions made to the Tribunal Vice-Chair. They ruled the decision should be referred back to the Tribunal for a re-hearing in accordance with the findings of the majority.

In her dissenting reasons, Justice Swinton held that a failure to refer to legislative history did not render the Tribunal's decision patently unreasonable. She noted this had not been raised before the Board, and was not a major issue referred to in other submissions, and moreover a failure to refer to certain evidence is not necessarily fatal to the decision of an administrative tribunal. Justice Swinton also observed that legislative history plays a limited role in the interpretation of legislation because of concern about its reliability. She held that the Tribunal's conclusion in this case was within its specialized expertise.

The Tribunal filed a notice of motion for leave to appeal to the Court of Appeal. In January the Court of Appeal granted leave to appeal (Winkler, Rosenberg and Lang). The Workplace Safety & Insurance Board again intervened.

The Court of Appeal Panel of Borins, Rosenberg and Gillese heard the appeal on September 11, 2008. The decision was released on October 21, 2008. In a majority decision (Gillese dissenting), the Court allowed the Tribunal's appeal. The majority agreed with Justice Swinton that the Tribunal's decision was not unreasonable. The Tribunal fulfilled its task to determine the meaning of earnings according to the Act and Board policy. The Tribunal's failure to refer to legislative history did not render its decision patently unreasonable. The majority held the Tribunal considered the proper evidence, and applied Board policy in finding the employer's contributions for employment benefits should not be included when calculating pre-accident earnings.

The majority also noted that the privative clause in the legislation is the "toughest" known to Ontario law. Although the standard of review after *Dunsmuir* is reasonableness, existing jurisprudence demonstrates that reviewing courts can only interfere if they find there are no lines of reasoning supporting the decision that could have reasonably led the Tribunal to reach the decision that it did.

The worker has applied for leave to appeal to the Supreme Court of Canada. Both parties filed their memoranda of law and at the end of the quarter the Tribunal was awaiting the Supreme Court's decision on the leave application.

2. Decisions Nos.610/05 (September 23, 2005) and Decision 610/05R (June 8, 2006)

The worker appealed for entitlement for a cardiac condition which he claimed was caused by stress at work. Board policy allows entitlement for a cardiac condition where a causal relationship is shown between the cardiac condition and an accident at work. In the case of stress, the policy requires "acute emotional stress with no significant delay in the onset of symptoms".

After an exhaustive review of the facts, the Tribunal denied the worker's appeal. The Tribunal found the worker did not suffer from a heart attack at the relevant times, there were no acute emotional stress events caused by work, and the worker suffered from a large number of significant pre-existing risk factors that made a contribution from workplace stress an insignificant factor in his ongoing cardiac problems.

The worker commenced an application for judicial review, on which he represented himself. He alleged numerous errors and breaches of natural justice by the Panel. The judicial review was heard on February 9, 2009 before Justices Wilson, Reilly and Karakatsanis. The decision was released on February 20, and unanimously dismissed the judicial review. The Court found that contrary to the worker's allegation he was provided with the opportunity to make submissions, so there was no breach of natural justice. The Court also found that the Tribunal's factual findings were amply supported by the evidence, and its conclusions were reasonable.

3. Decision No.1118/07 (January 18, 2007)

The plaintiff was allegedly injured while employed at a nuclear generating station. He brought an action against his employer. The employer's application to the Tribunal for an order taking away the plaintiff's right to sue was granted. The Vice-Chair found that although the employer was a federal undertaking, this did not take away the Tribunal's jurisdiction. He found that the *Nuclear Liability Act* did not limit the right to claim compensation.

The plaintiff commenced an application for judicial review. The Tribunal and the employer filed responding factums. The judicial review was heard on October 17, 2008.

The plaintiff's application for judicial review was unanimously dismissed by the Panel of Ferrier, Wilson and Lederman. Although the Tribunal argued the standard of review was reasonableness, the Court found the Tribunal's decision was correct so it was not necessary to decide whether the reasonableness standard applied. The Court agreed with the Tribunal's conclusion that *NLA* did not create a new statutory tort, that federal jurisdiction over nuclear power did not oust the provincial jurisdiction over employee compensation, and that section 12 of the *NLA* preserved the rights under the provincial *WCA*.

The worker filed an application for leave to appeal to the Court of Appeal. The worker's counsel then got off the record and the worker began representing himself. The Tribunal and the Tribunal's co-respondent consented to extend the time for the worker to file his leave materials until March 15. The worker failed to file his materials by that date, and the Court of Appeal dismissed the leave application for delay. At the end of the quarter the worker indicated he would again seek to extend the date to file his materials. The Tribunal, and the Tribunal's co-respondent, both advised the worker that they would not consent to a further extension, and would take no position should the worker bring a motion to extend.

4. Decision No.556/03 (June 27, 2008)

In September 1997 the worker suffered a workplace injury and initially received benefits for his low back and head, including a non-economic loss award of 57%. He also received loss of earnings benefits until the fall of 1999, when the Board ended benefits after videotape surveillance. The Board also reversed the NEL awarded as it related to the head injury and reduced the NEL award for the back to 5%. In related court proceedings, the worker was prosecuted for failure to report a material change in circumstances and pled guilty.

The employer appealed to the Tribunal seeking cessation of loss of earnings benefits after September 3, 1997 and revocation of the 5% NEL award for the low back. The worker cross appealed, seeking to reinstate benefits for his head and neck, ongoing wage loss benefits beyond April 21, 1998 and entitlement for chronic pain disability and/or psychotraumatic disability.

In Decision 556/03 the Panel allowed the employer's appeal and denied the worker's appeal. The Panel referred to the surveillance videotapes, which showed the worker, among other things, moving 50 lb flagstones and using a pick to remove a tree from his property. The Panel found that this was heavy work that a person would be unable to do if they had any serious back injury.

The worker had been in four car accidents before the workplace accident. The Panel noted that the Board had not had all the medical reports relating to those accidents when it made its decisions. The Panel also noted that, prior to the

workplace accident, the worker had complained to his insurance companies of headaches, dizziness, cognitive disturbances, depression, neck pain, and low back pain. When he saw his specialists after the 1997 injury he did not tell them about his car accidents. The Panel also found that, based on the evidence as a whole, it was unlikely that the worker lost consciousness or suffered a skull fracture in the workplace injury. The Panel found that the worker was entitled only to four weeks' of loss of earnings benefits for the low back, and no benefits for the head and neck.

The worker commenced an application for judicial review. Following a delay caused by the worker's counsel not responding to inquiries about the transcript, both parties filed factums. The judicial review is scheduled to be heard on May 14 in Toronto.

5. Decisions Nos. 351/07 (March 19, 2007) and 351/07R (March 6, 2008)

The worker's appeal for total disability benefits for a ten year period on the basis of his self-directed vocational rehabilitation plan was denied by the Tribunal. The worker has commenced an application for judicial review of the Tribunal's decisions.

In addition the worker seeks an interlocutory order certifying the judicial review as a class proceeding on behalf of all persons who have had benefits under the *Workers' Compensation Act* or *Workplace Safety and Insurance Act* denied solely on the basis of an adverse finding on their self-directed vocational rehabilitation plan.

Linking a class action with a judicial review is a novel remedy so far as the Tribunal is concerned. At the end of the quarter the procedural issues raised by this proceeding were being discussed with Applicant's counsel.

6. Decisions Nos. 207/05 (April 11, 2005) and 207/05R (January 10, 2006)

The plaintiff was injured in a motor vehicle accident. The tractor-trailer was driven by the defendant driver, and owned by the defendant trucking company. The defendants applied to the Tribunal for an order that the plaintiff's right of action was taken away.

The Vice-Chair found both the plaintiff and the defendant driver were workers of the defendant Schedule 1 trucking company, and that they were in the course of employment at the time of the accident. The Vice-Chair held the plaintiff's right of action was taken away.

The plaintiff commenced an application for judicial review more than two years after the Tribunal's reconsideration decision was released.

The Tribunal filed its Record of Proceedings. The defendant, which is the Tribunal's co-respondent in the judicial review, brought a motion to strike the judicial review for delay. As the plaintiff had not provided an explanation for the delay, the Tribunal supported the motion. The motion was heard on August 15, 2008. Justice Low dismissed the motion, without prejudice to the respondents renewing their request to dismiss for delay to the Divisional Court Panel hearing the judicial review.

The Tribunal and the Tribunal's co-respondent have filed their factums, and are currently awaiting a date for the judicial review.

7. **Decisions Nos.1509/02 (February 2, 2004) and 1509/02R (September 27, 2006)**

Two sisters were suspended at the same time for smoking in a non-smoking area at work. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (*Decision 1384/03*). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (*Decision 1509/02*). Sister #2 also brought an application for judicial review.

Sister #2 then decided to adjourn the judicial review, to permit her counsel to file an application for reconsideration with the Tribunal. The Tribunal consented to the adjournment.

The basis of the reconsideration application was that the Panel had failed to consider the worker's alternative argument that entitlement could have been granted on the basis of a recurrence. Vice-Chair Crystal denied the reconsideration on the grounds that the worker had failed to explicitly appeal the recurrence issue to the Tribunal. However, Vice-Chair Crystal also noted that there was a final decision of the Board on the recurrence issue, and it was open to the worker to bring a time extension application should she still wish to pursue that issue at the Tribunal.

Following the release of Decision 1509/02R, the worker retained new counsel. Her new counsel filed a time extension application. In Decision 2021/07E, Vice-Chair Ferdinand denied the request for a time extension.

The worker's counsel is pursuing an application to reconsider the denial of the time extension. The materials have been filed and at the end of the quarter it was to be assigned to be heard.

The judicial review application is still pending.

8. Decisions Nos.390/08 (February 22, 2008) and 390/08R (July 17, 2008)

The worker made a claim for an injury to his hand, arm and back after he had been terminated by his employer. The Board allowed benefits for two months in 2004. The worker appealed to the Tribunal for further benefits. The employer cross appealed, alleging no entitlement should have been granted at all. The Vice-Chair denied both the worker's appeal and the employer's cross appeal.

The worker commenced an application for judicial review. His counsel has filed his factum and at the end of the quarter the Tribunal was preparing its factum. The hearing of the judicial review application is scheduled for September 2009.

9. Decisions Nos.1132/02I (September 20, 2002), 1132/02 (July 13, 2004), and 1132/02R (June 15, 2005)

The worker appealed to the Tribunal for initial entitlement for a low back injury, which he alleged was caused by work incidents in 1996 and 1997. The Tribunal hearing took place over two days in 2003 and 2004.

The Panel found the worker to be a very poor historian and that his recollections of many events were in conflict with the case materials and not consistent with the medical reporting or the Board's extensive investigation report. The Panel found that there was insufficient evidence to support that the worker sustained a work-related low back problem in November 1996. The Panel found that the worker had initial entitlement on an aggravation basis for an accident on January 18, 1997, but was entitled to health care benefits only as he did not lose any time off work or suffer any permanent impairment. The Panel found that the worker had long-standing ongoing back problems since at least 1998 and that any ongoing problems were more likely a result of the natural aging processes of the worker's back rather than a result of the January 1997 accident.

The worker brought an action in damages against the Vice-Chair, which was dismissed by the Court in October 2006.

The worker then commenced an application for judicial review. The employer is a co-respondent in the application. The Applicant and the Tribunal have filed their factums and the judicial review is scheduled to be heard in late April 2009. At the end of the quarter the employer had not yet filed its factum.

10. Decisions Nos.397/05 (September 15, 2006) and 397/05R (February 20, 2007)

The worker injured his thumbs in 1999. He was granted LOE benefits until December 17, 2001 and a 25% NEL for the right thumb. He appealed to the Tribunal for LOE benefits after December 17, 2001, a NEL for his left thumb, or benefits for chronic pain or psychotraumatic disability. The worker also appealed for entitlement for benefits his shoulders, neck, low back, or dystonia, which he alleged arose out of the same injury.

The worker had a non-compensable injury in 1998. There were indications the worker had a pre-existing psychological problem which arose from the 1998 injury.

The Panel held that the worker had non-organic entitlement, but no organic entitlement for his various complaints. However, the Panel found the worker had entitlement for chronic pain, which included entitlement for the dystonia and for a NEL for the right thumb, and would replace the 25% NEL award for the left thumb. The Panel also found the worker was entitled to full LOE benefits from December 17, 2001 and continuing to date. Further, the worker was found entitled to an LMR assessment.

The worker commenced an application for judicial review. There were problems with the worker's materials. Counsel for the worker amended his materials as demanded by the Tribunal. At the end of the quarter counsel for the worker undertook to send the transcript to the Tribunal, following which the Tribunal will file its Record of Proceedings.

11. Decisions Nos.1791/07 (August 28, 2007) and 1791/07R (March 3, 2008)

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005 until the end of 2010. Entitlement was extended to include his low back, shoulders, and chronic pain disability. The worker was also granted a 45% NEL award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psycho-traumatic disability, and the amount of a NEL for chronic pain. The Panel held the worker had no entitlement for carpal tunnel syndrome,

he was not entitled to a psycho-traumatic award, and he was not entitled to an increase in his NEL.

The worker commenced an application for judicial review. Counsel for the worker mistakenly named the Board as the respondent instead of the Tribunal. The Tribunal consented to allow counsel to amend his materials, subject to conditions that protected the Tribunal's interests.

The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursues a further reconsideration. At the end of the quarter the reconsideration request was being processed and the judicial review was pending.

12. Decisions Nos.2835/07 (December 17, 2007) and Decision 2835/07R (May 26, 2008)

The worker's appeal for ongoing entitlement for organic and psychological disability was denied. The worker commenced an application for judicial review. The nature of the worker's judicial review application is not clear. The Tribunal has filed its Record of Proceedings, and at the end of the quarter was awaiting receipt of the worker's factum.

13. **Decisions Nos.717/08 (April 30, 2008) and 717/08R (October 23, 2008)**

The worker appealed to the Tribunal for an increase to his long term earnings basis from May 2000 to January 2003, and for a change to the Board's finding of a suitable employment or business (SEB) of a mail and message distribution which had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal, directing the Board to recalculate the worker's long term average earnings from May 2000 to January 2003, finding the SEB was not appropriate, and that his loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision, alleging the calculation of his long term earnings should have been higher, the Panel should have made the actual calculations rather than referring this to the Board, his short term earnings should have been higher, and taking issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to determine the time periods on which the calculation of long-term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker has commenced an application for judicial review. The nature of the worker's allegations are unclear. At the end of this quarter the worker had retained counsel to represent him on the judicial review, and the Tribunal was attempting to clarify the nature of the worker's application.

14. Decision No.985/05 (August 6, 2008)

In this French language appeal, the worker was a nurse's aide at a long-term care facility. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for fibromyalgia.

The worker claimed entitlement on a disablement basis, alleging her condition resulted from hard work. The Vice-Chair noted that hard work is not a medical condition and that there is no presumption that hard work causes injury, unlike occupational diseases where exposure to certain elements or conditions is recognized as causing injury. There was no objective evidence that the worker developed her fibromyalgia as a result of her employment. The rheumatologist who first diagnosed the worker's fibromyalgia indicated that that condition was not caused by employment-related physical stress.

The worker, who is self-represented, faxed the Tribunal a notice of application for judicial review. Since an originating process must be served personally, the Tribunal telephoned the worker to advise that the Tribunal would not accept service by fax. So far, the notice of application has not been properly served on the Tribunal.

15. *Decisions Nos. 1248/98* (November 13, 2003), and *Decision 1248/98R* (October 11, 2007)

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He is self-represented. The Tribunal filed its Record of Proceedings. The worker has refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal is not currently accepting further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the Tribunal's co-respondent took no position on the request. The Court granted the request and the worker now has until June 30, 2009 to perfect the judicial review application.

Highlights of Recent Decisions

Election and Double Recovery: WSIA and the Federal *Pensions Act*

Decision No. 1166/07 (February 19, 2009) (E. Smith) found that a worker had to elect under section 20 of WSIA to receive benefits either under the WSIA or under the Federal *Pensions Act*. The worker was claiming entitlement for mesothelioma. He had already received benefits from Veteran Affairs Canada under the *Pensions Act* for mesothelioma caused by exposure to asbestos while in the Navy. The worker claimed entitlement based on exposure to asbestos in Ontario between 1971 and 1973.

Section 20 applies when a worker is entitled under two regimes in respect of the same accident. Nothing significant turned on the difference between use of the word "benefits" and use of the word "compensation" in s. 20. The question is not whether the provisions of the different Acts are exactly the same but whether the payments under the *Pension Act* fall within the wording of s. 20 as entitling the worker to 1) compensation 2) under the laws of another jurisdiction 3) in respect of the accident.

Section 20 does not exclude recovery under both the WSIA and the *Pension Act* when a worker has suffered two different accidents, the second of which causes an aggravation of the earlier injury. In such a case, each regime is responsible only for the injury that occurred within the area of its jurisdiction. Section 20 does apply to duplicate entitlement for the same accident.

In this case, the Vice-Chair found that it is likely that only one of the relevant exposures caused the mesothelioma. Thus, there was only one accident. The facts of the case do not suggest that there were two accidents with the second accident aggravating the mesothelioma that had already been caused by the first accident. Rather, once the

worker had the mesothelioma further exposure would not have worsened his degree of impairment. The payments made under the *Pension Act* are, in substance, a form of workers' compensation benefits payable under the laws of another jurisdiction.

Entitlement to LOE after Retirement

Decision No. 250/09 (February 9, 2009) (T. Mitchinson, M. Christie, D. Broadbent) dealt with the question of whether a worker who is diagnosed with an occupational disease after a worker retires is entitled to Loss of Earnings (LOE) benefits. The Panel found that there was no statutory basis for the worker to be entitled to LOE benefits for the period in question. The Panel applied *Decisions No. 1581/06* and *884/08* and found that the worker had voluntarily retired and, thus, did not suffer a loss of earnings as a result of his compensable condition.

Reemployment Obligation - Number of Workers and Counting Voluntary Firefighters

Decision No. 1240/05 (January 13, 2009) (S. Ryan, B. Young, J. Crocker) examined the issue of whether volunteer firefighters should be included in the number of workers employed by the employer under the reemployment provisions of WSIA. Subsection 41(1) requires an employer to offer to reemploy an injured worker. Subsection 41(2) provides an exception to the reemployment obligations for employers who regularly employ less than 20 workers. Subsection 2(1) defines a worker as including a member of a municipal volunteer fire brigade. If the volunteer firefighters were included then the employer employed more than 20 workers and the reemployment obligations would apply. The Panel found that the employer was subject to the reemployment obligations in section 41. The Panel found that it was the intention of the Legislature to include firefighters under the definition of worker in order to ensure that they are subject to the same rights and obligations prescribed for all workers.

Subsection 41(16) provides that, if an emergency worker is injured, the deemed employer is not required to comply with the section. The actual employer is required to do so, but the deemed employer is required to pay the costs of compliance with s. 41(16). Subsection 41(17) provides that subsection (16) applies to a municipal volunteer fire brigade. The Panel found that these provisions recognize the circumstances of a volunteer firefighter. There was no other qualifying language that excluded volunteer firefighters as "workers" under s. 41(2).

Calculation of Funds Set Aside for Retirement Income

Decision No. 652/09 (March 30, 2009) (M. Crystal) upheld the Board's calculation of the amount set aside for a worker's retirement and found that the base amount for calculation of Loss of Retirement Income (LRI) is 10% of FEL payments actually paid after the CPP offset. A prior Tribunal decision, *Decision No. 1878/04*, had decided that the base amount for LRI was full FEL benefits without the CPP offset. A Board reconsideration request was denied by *Decision No. 1878/04R*, although the Vice-Chair

noted that the legislation could reasonably bear both the Tribunal's and the Board's interpretations.

Since the release of *Decision No. 1878/04R,* the Board published *Operational Policy Manual* (OPM) Document No.18-04-17 which added a definition of "FEL payment". The policy now defines this as the actual amount paid to the worker, including the CPP offset.

The Vice-Chair noted that *Decision No. 1878/04* addressed the same issue, but before Board policy contained the above definition. OPM Document No. 18-04-17 stated it was applicable to "all decisions made on or after August 1, 2003, for accidents from January 2, 1990 to December 31, 1997." The Vice-Chair did not interpret the policy as retroactively setting out a different manner of calculation of the base LRI amount. It was clarifying the interpretation of s.44 (1) in the face of the Board's and the Tribunal's prior inconsistent interpretations, and was not a substantive change. Therefore, the Vice-Chair found that the policy applied in this case.

Retroactive Interest

Decision No. 15/09 (March 5, 2009) (J. Moore) found that the standard for what constitutes exceptional circumstances in retroactive interest cases is different in determining: (1) whether a worker will get interest when the time period is covered by the policy on interest payments but the worker falls outside the specific policy terms; and (2), whether that interest should be payable prior to January 6, 1989, the start date of interest payments under the policy.

The Vice Chair noted that under the interest policy, interest is payable for pre-1990 claims only in respect of an appeal level decision. The Vice-Chair found that even though the error in this case was corrected at the operating, not the appeals level, the merits and justice of the case required that interest be granted on the retroactive benefit granted to the worker in 2007.

In considering whether interest was payable to the worker prior to January 6, 1989, the Vice Chair noted that under the interest policy, workers are not entitled to interest before January 6, 1989. In reviewing Tribunal authorities on interest, the Vice Chair found that decisions which allowed payment of interest prior to January 6, 1989, did so because the facts were "so fundamentally exceptional" that the merits and justice required that interest be paid prior to that date. The Vice Chair found that allowing a worker entitlement to a benefit which is not generally available "ought to require particularly exceptional circumstances." The Vice Chair found that in this case the facts did not reflect such manifest unfairness that the worker should be given a benefit which was not otherwise available and denied interest prior to January 6, 1989.

S. Adams, WSIAT
April 2009